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Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

IN THE SUPREME COURT OF THE UNITED STATES

No. 72-1135

OCTOBER TERM, 1972

ROBERT MORRIS, et al.,

Petitioners

v.

WERNER-CONTINENTAL, et al.,

Respondents

PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals

For the Sixth Circuit

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Respondents

PETITION FOR A WRIT OF CERTIORARI
To the United States Court of Appeals for the Sixth Circuit

Petitioners pray that a writ certiorari issue to the United States Court of Appeals for the Sixth Circuit to review a judgment of that court entered on September 20, 1972 in the above case.

OPINIONS DELIVERED IN COURTS BELOW

The opinion of the Court of Appeals is reported at 466 Federal 2d 1185 and is printed in Appendix III, hereto.

A Memorandum of Decision and Order was issued by the District Court but is unreported. It is printed in Appendix II, hereto.

JURISDICTION

The judgment of the Court of Appeals was entered on September 20, 1972. The time within which to file this petition was extended to February 17, 1973 by order of the Honorable Potter Stewart, Associate Justice entered on December 11, 1972.

Jurisdiction to review the decision of the United States Court of Appeals for the Sixth Circuit is conferred on this Court under Title 28 U.S.C. Section 1254.

The portion of that section pertinent to the jurisdiction in this review provides as follows:

"Cases in the Courts of Appeals may be reviewed by the following methods:

1. By writ of certiorari granted upon the petition of any party to any civil or criminal case before or after rendition of judgment of decree."

QUESTIONS PRESENTED FOR REVIEW

1. Did refusal of an arbitration panel to allow grievants to be represented by counsel deny them due process of law and violate their right to a fair hearing?

2. Could grievant denied counsel in an arbitration hearing be said to have waived his rights to complain of procedural defects during the hearing?

3. Does a grievance panel composed of persons inherently biased, having no impartial arbitrator violate a grievant's right to a fair hearing?

4. Is a provision in a collective bargaining agreement which arbitrarily and capriciously discriminates against one class of persons under the agreement by depriving them of their seniority rights in derrogation of public policy?

STATUTES INVOLVED

Labor-Management Relations Act. § 301 (a), 29 U.S.C. § 185 (a)

STATEMENT OF THE CASE

In October of 1967, Harvey Werner, President of Werner Transportation Company, filed an application with the Interstate Commerce Commission seeking approval of a merger of his company with Continental Transportation Lines, Inc.

The surviving entity was to be called Werner-Continental, Inc.

Both firms were covered under a collective bargaining agreement known as the National Master Freight Agreement which provides for the arbitration of grievances before area committees in various sections of the country. This agreement

is negotiated on a national basis by the International Brotherhood of Teamsters with various representatives of the trucking industry. At the times of the negotiations, the bulk of the agreement remains in full force and effect, while some few provisions usually pertaining to benefits are reopened for collective bargaining.

Since the agreement is negotiated nationally, it is virtually impossible for petitioners to prevail on their local unions to change inequitable sections of the contract.

The petitioners in this action are all employees of what was known as Continental Transportation Lines. Since the filing of the action in the District Court, many of the petitioners have been discharged or forced to find other employment due to the loss of their seniority rights as will be explained hereinafter.

The provision in the contract giving rise to the filing of the lawsuit in the District Court provides that in the event of the merger of truck lines, the senority lists will be "dovetailed", or integrated. This dovetailing results in the formation of a new seniority list based upon length of service, in either company's employment. A supplementary agreement called the Ohio Past Practice contained the same provisions relating to mergers and purchases and codified the local past practice regarding dovetailing of seniority lists.

In the event of a purchase, the seniority of all of the employees of the purchased Company is subordinated to that of the employees of the purchasing Company. Thus under the provisions of the contract, if Werner merged with Continental, the seniority lists would be dovetailed. If Werner purchased Continental, all of the Continental drivers would lose their seniority.

The form of the proposed merger of Werner and Continental was based upon an exchange of Continental stock for Werner-Continental stock. Werner-Continental as the survivor would authorize the issuance of a substantial amount of preferred stock which would be exchanged for the stock of Continental and be convertible into common stock of Werner-Continental at the election of its owners.

Prior to the submission of the application for merger to the I.C.C., a document entitled "Plan and Agreement of Merger" was signed by officers of both firms. Following the signing, a letter was sent to all of the Continental and Werner stock-

holders stating "Today your directors have approved a merger." Many of the petitioners received such a letter as stockholders of Continental Transportation Lines.

Based upon its own analysis of the transaction, the Interstate Commerce Commission approved the transaction as a merger of companies. Following the I.C.C. approval, meetings of stockholders of each corporation were held pursuant to written notices describing the transaction as a merger. Based upon both written and oral representations of the companies respective officers that the transaction was a merger, the stockholders of both firms approved the transaction.

Nothing remained but the necessity of adjusting the combined labor forces of Werner and Continental. On January 12, 1968, Mr. George Townsend, a Werner Vice-President, requested the Ohio Joint State Grievance Committee to place the question of seniority on its January agenda. The Ohio Joint State Grievance Committee is one of the area committees charged with arbitrating disputes under the National Master Freight Agreement and the one directly concerned with the Werner-Continental merger.

The committees set up under the Master Freight Agreement are unique in that they are composed of ten parties who presumably have a direct, mercenary interest in the outcome of the disputes they decide. Five of the members are union officials representing truck line employees while the other five are members of the various state trucking associations, representing management. Unlike other such agreements, there is no impartial, trained arbitrator whose knowledge and integrity is known and trusted by the parties acting to decide the matters coming before the committee.

Without giving notice to the interested parties whose seniority would be affected by their decision, the Joint Committee placed the item on the January, 1968 agenda and ruled that based upon the information before it, the transaction was a merger and the seniority lists were to be dovetailed.

On February 23, 1968 just five days before the meetings of Werner and Continental stockholders, Townsend once again wrote the Joint Committee and requested a special meeting because as he stated, "after further analysis, we (Werner Transportation Company) hereby state that ours is a purchase in the form of a merger to avoid a taxable transaction". On February 27, 1968 the Committee once again met and

considered the matter without giving interested parties a chance to appear, or even informing them that the matter was before the Committee. This time the Committee completely reversed their prior decision, and stated that the transaction was a purchase and that the employees of Continental were to lose their seniority.

Notwithstanding this decision, Werner issued a Quarterly Report to Stockholders, advising them that the "merger" became effective March 1st, all the while implementing the Joint Committee decision based upon the ruling that the transaction was a purchase.

On November 1, 1967 in order to protect his right to be heard and present evidence on the matter of seniority, one of the plaintiffs, Robert Morris filed a grievance with his local union stating that he believed that a violation of the collective bargaining agreement would occur and that the seniority lists would not be dovetailed. In spite of the fact that the Joint Committee was about to consider the matter of the Werner-Continental seniority prior to the consumation of the transaction, Morris' local union took the position that no act had yet occurred which would give Morris the right to be heard.

Following the second Joint Committee decision, the petitioners sought the advice of counsel, and on March 1, 1968 this action was begun in the United States District Court for the Southern District of Ohio, seeking to enjoin the enforcement of the Joint Committee decision. On March 12, 1968, that court ruled that the grievance filed by Morris was premature and ordered the Joint Committee to review and redetermine its inconsistent rulings before April 12, 1968. In addition to hearing Morris' grievance, the Committee elected to also hear grievances from the three other defendant local unions.

Although the matter was already before the District Court and counsel for the petitioners had entered an appearance in that action, pursuant to a provision in the rules of the Joint Committee the petitioners were denied the right to be represented by counsel during the hearing. Their attorney could not even attend the hearing as an observer, since under the committee's rules, all grievances must be presented by a union representative and no outsiders could attend.

In spite of their duty to represent him, Morris' union officials failed to present his case. Although he had never

participated in a grievance hearing before, Morris was forced to proceed in his own behalf. Most of the other grievants and their witnesses did not appear at the hearing since they had been told by a business representative of Local 957 that the meeting was to be held the following day.

Although the Committee's rules of procedure provide that "*Any member of the Joint Committee who, as a result of his position or employment, is a party to a case before the Committee* **shall be removed** *from the Committee during the judgment of that particular case*" (emphasis added), the minutes of this meeting and of the decisional meeting held May 15th reflect that three of the five committee members representing grievants also acted as "arbitrators" in violation of the Joint Committee's own rules.

The Joint Committee did not reach its decision merely on the evidence presented to it on its April 18, 1968 meeting. The Committee, through its Executive Secretary had obtained a letter from the Securities and Exchange Commission relating to the transaction, but the existence of this letter was not disclosed to the grievants and thus they were denied an opportunity to explain or refute the statements contained in the letter.

Still other procedures were violating petitioners' right to due process of law during the meeting of April 18th. The grievants were not allowed to remain in the hearing room at any time except when they were giving their individual testimony. They were also excluded from hearing anyone else testify. In addition, although grievants were not allowed to be represented by counsel at the hearing, counsel representing the union was allowed to consult with the Committee.

Following the decision depriving them of their seniority rights, petitioners filed an amended complaint in the District Court bringing the Court up to date on the actions of the Joint Committee. This complaint sought to declare the decision of the Committee null and void and requested judgment for the petitioner's wages and other benefits. A copy of the complaint is attached as Appendix I.

On October 6, 1971, the District Court entered a Memorandum of Decision and Order which stated in essence that the court could not decide whether the transaction was a merger or a purchase, since the question had been decided by the bargained-for tribunal after a fair hearing. Thus the decision

of the Joint Committee was allowed to stand. A copy of the Court's decision is attached as Appendix II.

With respect to the contentions of the petitioners that they were unfairly represented and that the irregularities taking place during the grievance hearing denied them their right to due process of law, the Court ruled that they had waived any objections that they may have had to any alleged irregularities in the proceeding by participating therein.

Despite the facts that the grievants were not allowed in the hearing room during the proceeding and were not allowed to be represented by counsel, the court ruled in essence that these truck drivers, untrained in the law, knew or should have known of the defects in the hearing prior to or during the arbitration. A copy of the District Court's decision is appended hereto as Appendix II.

Petitioners accordingly filed a timely appeal to the United States Court of Appeals for the Sixth Circuit which affirmed the action of the District Court stating in part that although "it was extremely difficult to see how the Joint Committee could transform the merger that took place into a purchase, absent fraud, bad faith, bias or collusion, the courts are powerless to interfere." The Court also restated the District Court's contention that the petitioners had waived their right to object to the procedural errors by submitting to the arbitration. A copy of the Court of Appeals Decision is appended hereto as Appendix III.

REASONS FOR GRANTING THE WRIT

The decision of the Court of Appeals upholding the denial of appellant's right to counsel and right to complain of procedural errors during the arbitration involves an important question of federal law which has not been, but should be, settled by this Court.

ARGUMENT

This case presents a unique question of law which has not been previously decided by this Court. That question involves a determination of whether a grievant in an arbitration hearing is entitled to be represented by counsel and the effect of such denial.

Since this Court has held that arbitration of labor disputes is favored as a matter of Federal policy, and that this policy would be impaired if the Court undertook to substitute their decisions for the awards of arbitrators, *United Steel Workers v. Enterprise Wheel and Car Co.* 363 U. S. 593, 80 S. Ct. 1358, 4 L. Ed. 2d 1424 it must now go a step further and outline the rules of due process of law applicable to such proceedings.

The system of American Jurisprudence is based upon the right of the individual to due process of law. This Court has held that a person is entitled to examine witnesses against him, the right to offer testimony and the right to be represented by counsel, but that rule has remained applicable mainly to criminal matters. *In re Oliver,* 333 U. S. 257, 68 S. Ct. 499, 92 L. Ed. 682. Conversely some of those rights have been denied to members of a labor union. The Courts have said that "The right to be represented by counsel, guaranteed by the Sixth Amendment to the Constitution of the United States does not apply to hearings before labor unions". *Smith v. General Truck Drivers Local 467* 181 Fed. Supp. 14. (USDC SD Cal. 1960) Perhaps such a decision can be justified on the premise that the courts have no right to interfere in internal union affairs, but what of an arbitration proceeding? This Court has repeatedly held that a union member included in a collective bargaining agreement cannot in most cases seek the aid of the Courts in overturning an arbitrator's decision. Thus the arbitration panel becomes a substitute for the Court and the member thus submitting his grievance should be protected in the procedures followed by the arbitration panel. Once having relegated the grievant's rights to his bargained-for tribunal, the right to due process of law should be extended to arbitration proceedings. In the case at hand, due process should include the right to be represented by counsel as well as the right to be present during the entire hearing. Both of those basic rights were denied the petitioners and resulted in a grievous error which should be rectified by this Court.

And what of the contention of the District Court and the Court of Appeals that the petitioners waived their right to complain of the hearings' irregularities by participating in the hearing? How can a truck driver, or group of truck drivers untrained in the law, deprived of the right to counsel have known what the irregularities were going on around them?

The contention that they waived their rights is grossly in error.

Let us examine these irregularities that were said to have been waived. What of the grievants that were told that their testimony would be taken the next day and thus were deprived of their right to attend? What of the grievants that did attend, only to be told that they could not remain in the hearing room while the testimony would be given? What of the petitioner Robert Morris, untrained in the law and attending his first grievance session? He was forced to present the case himself although his union officials were present and required under the rules to present his case. How could Morris have known of the rule requiring three of the five members of the board to remove themselves? Why did these three members not disqualify themselves in accordance with the rule they knew to exist? The entire proceeding was permeated with the denial of the grievant's right to due process of law.

It is time for the Courts to enforce the grievant's right to a lawyer of his own choosing. Lacking that protection, to allow him to come to court to seek redress of the procedural errors that denied him a fair hearing.

Another important question before the Court is regarding the inherent bias of a grievance panel containing no impartial arbitrator. When this Court stated that it favored arbitration as a matter of Federal policy, it could not have contemplated a panel consisting of all interested parties.

Arbitration contemplates an adversary hearing before an impartial hearing board. It is established law that an interested party cannot appoint himself as arbitrator. *Garrison v. International Union of Operating Engineers* 283 Fed. Supp. 771. (USDC SD NY 1968) It is also established that fairness, disinterestedness and impartiality are requisite qualifications of arbitrators. 6 *C.J.S. Arbitration and Award* Para. 46(b) p. 186 In *Commonwealth Coatings Corporation v. Continental Casualty Co.* 343 U.S. 145, 89 S. Ct. 337, 21 L. Ed. 2d 301 the court said that it has not doubt . . .

"that if a litigant could show that a foreman of a jury or a judge in a court of justice had, unknown to the litigant, any such relationship, the judgment would be subject to challenge . . . Since in the courts this is a constitutional principle, we can see no basis for refusing to find the same concept in the broad statutory language that governs arbi-

tration proceedings . . ."

At its best, arbitration has inherent vices. In this situation, we see it at its worst where there is not even one impartial arbitrator.

> "A system of adjudication in which the judge depends for his livelihood, or for a substantial part of his livelihood or even for substantial supplements to his regular income, on whether he pleases those who hire him to judge is per se a thoroughly undesirable system . . . Labor arbitration is a private system of justice not based on law and not observant of law . . . We know that a large proportion of the awards of arbitrators are rendered by incompetents, that another proportion—we do not know how large but are permitted by the circumstances to suspect that it is quite large—is rendered on the basis of what award might be best for the arbitrator's future. We know there is another group of cases . . . In which the arbitrator has rendered a rigged award (one to which both union and employer have secretly consented without the knowledge of the employees."
> *P. Hays, Labor Arbitration: A Dissenting View.* 112, 13. Storrs Lectures at Yale University, 1966.

And what of the argument that the employees submitted to such a provision in accepting the contract and are bound by it? In denying reversal of this cause, the United States Court of Appeals for the Sixth Circuit took note of the fact that the employees affected by this contract probably could not cause its change, in stating:

> ". . . The issue is further complicated because of the circumstance that the rights of the complaining employees are to be fixed, under their bargaining agreement, by terminology used between their employer and another corporation, and under such circumstances it is doubtful that the employees complaining in this action have the standing to prevent a practical rewriting of the contract which fixes their rights as to seniority . . ."

As a practical matter, the grievants have no opportunity to change their agreement since it is negotiated on a national

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basis by the International Union with which their local is affiliated. The contract remains in effect as a perpetual instrument in derrogation of their rights, since only certain parts selected by the International Union are reopened for negotiation and the rest remain unchanged.

In the case at hand, the panel is composed of ten inherently biased "arbitrators". Five union officials who in theory at least would need to advocate the cause of the member-grievant and five trucking industry officials who should act similarly to protect the trucking interests. As a practical matter, such is not the case. The composition of the panel makes it subject to collusion and a situation where one grievant's rights are traded for those of another to prevent each case from being hopelessly deadlocked.

In his book on labor relations, Clarence Updegraff outlines the most frequently used methods of selecting arbitrators. He describes instances where interested parties referred to as arbitrators,

> "... are not expected to decide anything or participate in the decision or award. When the chairman or impartial arbitrator is appointed, these so called "arbitrators" appear before him as attorneys or spokesmen for their respective constituents and through presentation of evidence and arguments to him, seek to obtain his adherence to the view of the side that made their appointments. It is a misnomer to call these parties "arbitrators". Such designation somewhat unnecessarily complicates the procedure ..."
> *Arbitration and Labor Relations*, 3rd Edition. Updegraff.

What of a procedure with ten such "arbitrators"? It is clear that the very composition of the panel violated the grievant's right to a fair and impartial hearing.

The final question to be touched on is that of the legality of a provision in a collective bargaining agreement discriminating against some members of the bargaining unit without rhyme or reason.

Where the decision of a negotiating committee is so unreasonable as to be arbitrary or capricious, that decision must be held unenforceable. *Marble Products Co. v. Local 155*, 335 Fed. 2d 468 (USCA 5, 1964). Arbitrary and capricious in the legal sense means without rational basis. *Dell Publishing*

Company v. Summerfield, 198 Fed. Supp. 843 (USDC DC 1961) What is this provision of the contract but arbitrary and capricious? To go one step further, we feel that it is in derrogation of the public policy favoring retention of seniority rights when those rights have been established by contract.

Although seniority rights are only established by contract, *Trailmobile Company v. Whirls,* 331 U.S. 40, 67 S. Ct. 982, 91 L. Ed. 1328 in at least one instance, the Courts have voided a provision in a contract which destroyed the employees seniority. In *Commercial Telegraphers Union v. Western Union Telegraph Co.* 53 Fed. Supp. 90 (USDC DC 1943) the Court stated:

> "... Certainly no formal change in the corporate structure of an employer ought to be permitted to vitiate its relations with its employees or lessen its obligation under the NLRA ... The Commission believes this (merger of seniority lists) is the only policy consistent with the public interest and that any other policy would not only be inequitable, but would have disastrous effects on the already critical manpower problem ..."

We submit that the foregoing law is applicable to the instant case. Public policy preponderates against a contract that will discriminate against the very workers it is designed to protect. This provision of the contract is so arbitrary and capricious that it cannot be allowed to stand.

For all the reasons set out in the foregoing, this petition for a writ of certiorari should be granted.

Respectfully submitted,

Stanley H. Sidicane
Box 413, Nashville, Tenn. 37202

Counsel for Petitioners

APPENDIX I
IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO WESTERN DIVISION

ROBERT MORRIS, et al
Plaintiffs

-vs- CIVIL ACTION NO. 6685

WERNER-CONTINENTAL, INC.
2500 West County Road
Roseville, Ransey County, Minnesota

WERNER TRANSPORTATION COMPANY
2500 West County Road
Roseville, Ramsey County, Minnesota

CONTINENTAL TRANSPORTATION LINES, INC.
McKees Rock, Pennsylvania

et al

Defendants

THIRD AMENDED COMPLAINT

1. This action arises under U.S.C. Title 29 §185 (a), also referred to as Section 301 of the Labor Management Relations Act.

2. The Plaintiffs bring this action as representative parties of Werner-Continental, Inc., employees who were formerly employed by Continental Transporation Lines, Inc., prior to the merger of Continental Transportation Lines, Inc., and Werner Transportation Company, and who are members of the International Brotherhood of Teamsters, and who are represented locally by Local Union No. 100, Cincinnati, Ohio, Local Union No. 413, Columbus, Ohio, Local Union No. 407, Cleveland, Ohio and Local Union No. 957, Dayton, Ohio.

3. The Plaintiffs are the representatives in this class action since the class consists of over 100 employees and the joinder of this number of parties is impracticable, since the questions of law and fact which would arise in actions brought by each member of this class are common to this action, since the claims of the Plaintiffs are typical of the claims of the other employees, and since the Plaintiffs will fairly and adequately protect the interests of the class.

4. On October 12, 1967, a plan and agreement of merger was proposed wherein Continental Transporation Lines would merge into Werner Transportation Company, with the surviving corporation to be named Werner-Continental, Inc. On February 26, 1968, a special meeting of the holders of the common stock of Continental Transporation Lines, Inc., was held at which time the merger was approved by the stockholders upon the recommendation of the Board of Directors of Werner Transportation Company and the Board of Directors of Continental Transporation Lines.

5. On or about March 1, 1968, this action was begun to enjoin the Defendants from implementing a decision of the Ohio Joint State Grievance Committee, a body organized for the adjudication of grievances under the National Master Freight Agreement and Central States Area Local Cartage Supplemental Agreement entered into among the Defendants on or about April 1, 1967 (hereinafter referred to as the Collective Bargaining Agreement.)

6. On March 12, 1968, this Court ordered that a grievance filed by Local Union No. 100 on November 1, 1967, was premature and that the inconsistent decisions of the Ohio Joint State Grievance Committee issued on January 16, 1968, and on February 27, 1968, were to be reviewed and redetermined on or before April 12, 1968.

7. On April 17, 1968, the Ohio Joint State Grievance Committee met and heard the grievances of Local No. 100, Local No. 407, Local No. 413 and Local No. 957.

8. On May 15, 1968, the Ohio Joint State Grievance Committee's decision found that "Werner Transportation Company did in fact purchase Continental Transportation Lines and the employees of Continental Transportation Lines are properly placed at the bottom of the consolidated seniority lists of Werner Continental, Inc., at the specified terminal points in accord with the established Ohio Practice."

9. In processing the grievances filed by Robert Morris and Local No. 100, in the period from November 1, 1967, to the present time, the Locals and the Union gave only perfunctory consideration to the grievances, connived with the Ohio Joint State Grievance Committee, and engaged in hostile discrimination against the class instituting this action. As a result, the Locals and the International Brotherhood of Teamsters have breached the bargaining agent's duty of fair representation by conducting these proceedings without good faith.

10. In the Ohio Joint State Grievance Committee hearings, the class represented by the Plaintiffs was deprived of a fair hearing as a result of the Locals' and the Union's failure to present the claim of the class in a good faith manner. Had the employees been represented fairly, dispositive facts and theories which are in the possession of this calss could have been presented.

11. As a result of the inadequacy of the hearing and the lack of good faith representation, the Ohio Joint State Grievance Committee's decision is unreasonable and discriminatory. Considering the evidence which was presented or could have been presented showing conclusively that the action of the two companies was a merger and further considering the Ohio Practice incorporated into the Collective Bargaining Agreement which requires dovetailing of seniority lists when companies merge, the Ohio Joint State Grievance Committee's decision is without any reasonable grounds, is arbitrary and is the direct result of the breach by the Locals and the Union of their duty of fair representation. The decision, being without reasonable grounds, is, therefore, null and void.

12. The employer, Werner Continental, Inc., has relied on the decision of the Joint State Grievance Committee and has placed the class represented by these Plaintiffs at the bottom of the seniority list. In implementing this null and void decision of the Ohio Joint State Grievance Committee, the employer, Werner Continental, Inc., has used an invalid decision for the basis of its action and is, therefore, in violation of the terms of the Collective Bargaining Agreement.

WHEREFORE, PLAINTIFFS DEMAND:

1. That the Court declare the decision of May 15, 1968, of the Ohio Joint State Grievance Committee to be null

and void;

2. That the Court declare no reasonable finding could be made by the Ohio Joint State Grievance Committee other than that the transaction between Werner Transportation Company and Continental Transportation Lines, Inc., was a merger for all purposes;

3. That the Court order the Locals, the Union and the Ohio Joint State Grievance Committee to apply to this controversy the Ohio Practice Rules relating to mergers;

4. That the employer, Werner Continental, Inc., be preliminarily and finally enjoined from placing the employees represented by this class action at the bottom of the seniority list on the basis of the Ohio Joint State Grievance Committee's decision of May 15, 1968.

Additionally, the Plaintiffs demand that the Plaintiffs and the other employees represented by this class action have judgment in damages against the Defendants for:

1. Wages and other employment benefits owing to them from the date of the merger, March 1, 1968, based upon a dovetailed seniority list effective on that date, the amount and type of which to be determined by the Court, deposited with the Court by the Defendants and distributed through the Court to the members of the class represented in this suit;

2. Interest accrued from the date of the merger for the wages and other employee benefits owing;

3. Costs of the Plaintiffs.

TYLER, KANE & RUBIN
Attorneys for Plaintiffs

APPENDIX II
UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

ROBERT MORRIS, et al.,
Plaintiffs,

v.

NO. 6685

WERNER-CONTINENTAL, INC., et al.,
Defendants.

MEMORANDUM OF DECISION
AND ORDER

In 1967 the Werner Transportation Co. and Continental Transportation Lines, Inc., entered into a statutory merger agreement which was subsequently approved by the respective shareholders. The new company was known as Werner Continental, Inc., but, in fact, the Werner Transportation Co. was the survivor. Operations were moved from the Continental terminals to the Werner terminals, and the Werner managers were retained in their former positions while the Continental managers were delegated to an assistant manager position. Mr. Werner retained full control of the newly merged company. The evidence shows that Werner was at all times a successful, prosperous company, while Continental was in financial difficulty.

This litigation grows out of the allocation of seniority between the employees of the two merged companies. Plaintiffs seek a dovetailed seniority system, *i.e.*, a system unifying the two previously separate seniority lists in a manner favorable to the former Continental employees. The defendants support the arbitration committee's decision placing the former Continental employees, in order of seniority, at the bottom of the Werner seniority list. For reasons that follow, we reject plaintiff's contentions and uphold the decision of the committee which placed the former Continental employees below the Werner employees on the seniority

ladder.

The parties in this case, except for the defendant committee, are signatories to the National Freight Agreement and its supplement, the Central States Local Cartage Supplemental Agreement. This agreement covers the seniority rights of all the employees in this action. It is clear that plaintiff's claim is governed by this contract. Section 1 of Article 41 of the agreement provides that seniority controversies shall be submitted to the grievance procedure. Article 42 provides for a joint state committee (previously referred to as the arbitration committee) made up of five employer representatives and five union representatives, which is designed to settle disputes which cannot be settled between the employer and the local union. The agreement provides that a decision of the joint committee is final and binding. The joint committee (OJSC) has established rules governing seniority as follows:

> The established Ohio practice is that employees of the purchased company are placed at the bottom of the seniority list of the purchasing company. The past practice shall continue to apply to all Ohio domiciled employees, except in the event of merger when the seniority of the employees affected shall be dovetailed by chronological listing unless otherwise mutually agreed to by the parties.

Thus, whether the former Continental employees are to be dovetailed or placed at the bottom of the Werner list depends upon whether in fact this transaction was a merger or a purchase. The rationale behind the Ohio Past Practice is that a purchasing company is able to purchase because, generally speaking, it has better personnel and is more efficient than the acquired company. Therefore, the employees of the purchasing company should retain all of their valuable seniority, and the acquired employees should be placed below them in seniority. According to this rationale, when companies merge the employees are presumed to be of equal competence and are therefore dovetailed. Application of the Ohio Past Practice in this case is justified by the fact that Werner was a successful company, desirous of expanding into new territory, while Continental, licensed in a territory separate from Werner, was experiencing financial difficulties. (Even though

there is rationale behind the practice counsel advise that it has been omitted from recent contracts.)

Plaintiff has submitted evidence and argument tending to show that what occurred between the two companies was a merger and not a purchase. Defendants have submitted evidence and argument tending to show the opposite. From this evidence it is clear that much of the controversy stems from the fact that the OJSC originally stated in response to a letter from Werner Co., that if the transaction was a merger, the employees should be dovetailed. The Werner Co. posted dovetailed seniority lists which generated complaints from the Werner employees who felt they were disadvantaged by the dovetailing. In response, Mr. Werner had a second letter sent to the OJSC describing the transaction as a purchase in the form of a merger for tax reasons. The OJSC then advised Werner that if this were true, the former Continental employees would go to the bottom of the seniority list. The Werner Company then posted a second seniority list in which former Continental employees were at the bottom. This prompted the filing of grievances by the local unions with the OJSC. On April 17, 1968, the OJSC met to decide the grievances. At the outset, the OJSC explained that its two contradictory "decisions" involved no factual determinations, but were merely guidelines for the application of seniority. The plaintiffs in this case represented the former Continental employees before the OJSC and after a full and fair hearing, the OJSC rendered a unanimous decision that the transaction was in fact a purchase and that the former Continental employees should be placed at the bottom of the seniority list according to the Ohio Past Practice.

This Court cannot and will not decide whether there was a merger or purchase in this case. *Steelworkers* v. *American Mfg. Co.*, 363 U.S. 564 (1960). That question was decided by the bargained-for tribunal after a full hearing. Federal labor policy dictates that one party to a grievance cannot sidestep final and binding grievance procedures merely because of an adverse decision. *Steelworkers* v. *American Mfg. Co., supra; Steelworkers* v. *Warrior & Gulf Co.*, 363 U.S. 574 (1960), *Steelworkers* v. *Enterprise Corp.*, 363 U.S. 593 (1960). If a grievance procedure cannot be made exclusive, it loses much of its desirability as a method of settlement. *Republic Steel Corp.* v. *Maddox*, 379 U.S. 650 (1965).

Plaintiff attacks the OJSC decision in two ways: (1) by claiming that certain procedural requirements were not met and that therefore the OJSC hearing was biased and unfair; and (2) by claiming that the union breached its duty of fair representation.

With respect to the first contention, plaintiff makes a number of allegations of defects and bad faith in the OJSC hearing. For example, plaintiff claims that a grievance document was not signed by the proper person, that members of the union locals sat on the OJSC panel when they should have excused themselves according to OJSC rules, that the grievances were not heard by local committees first, that a business agent should have argued the case before the OJSC instead of plaintiff, and that the various business agents did not make enough inquiry into the status of the transaction while it was pending. Insofar as these allegations relate to plaintiffs' claim of unfair representation, we cannot say that any of these alleged actions or omissions amount to bad faith, fraud, or discrimination against the plaintiffs. With regard to plaintiffs' procedural attack on the OJSC proceedings, "It is well settled that defects in proceedings *prior to or during* arbitration may be waived by a party's acquiescence in the arbitration with the knowledge of the defect." (Emphasis added.) *Order of Ry. Conductors* v. *Clinchfield* Plaintiffs knew or should have known of the defects now raised prior to or during the arbitration. We hold that plaintiffs waived any objections they may have had to the alleged irregularities Disgruntled losers cannot first raise their objections after an award has been made. *Garfield & Co.* v. *Wiest*, 432 F. 2d 849 (2 Cir.) cert. den. 401 U.S. 940 (1971). In *Clinchfield, supra,* the Sixth Circuit Court of Appeals held that the plaintiff had waived objections to the size of the arbitration board by acquiescence to the arbitration. We note that the decision of the OJSC was unanimous and conclude that a change in the panel such as plaintiff suggests, would not have nullified the majority vote of the other members. Plaintiff cannot successfully press his allegation that an intermediate step in the grievance procedure was improperly dispensed to *Clinchfield, supra.* If the impeaching party's own action contributes to a variance in the prescribed procedure, such party may be estopped to complain of the variance. 5 Am. Jr. 2d, Arbitration and Award §183 (1962.)

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We are convinced that the bargained-for procedure was intended to cover the dispute and, in addition, that the procedure was adequate to provide a fair decision. *Bieski* v. *Eastern Automobile Forwarding Co.*, 396 F. 2d 32 (3 Cir., 1968). Therefore, this Court cannot review the merits of the OJSC decision unless plaintiff can prove his second contention, that the union breached its duty of fair representation. *Bieski, supra,* at 38. *Humphrey* v. *Moore,* 375 U.S. 335 (1964), made it clear that a union has a duty to fairly represent its members. According to *Vaca* v. *Sipes,* 386 U.S. 171 (1967), there is a breach of this duty of fair representation only when the union's conduct is arbitrary, discriminatory, or in bad faith. See also *St. Clair* v. *Local 515, Int'l Bro. of Teamsters,* 422 F. 2d 128 (6 Cir., 1969). Plaintiff must show that the union was motivated by bad faith. *Balowski* v. *Int'l U., United A., A. & A. Imp. Wkers,* 372 F. 2d 829 (6 Cir., 1967). A wide range of reasonableness must be allowed a statutory bargaining representative in serving the unit it represents, subject always to complete good faith and honesty of purpose in the exercise of its discretion. *Ford Motor Co.* v. *Huffman,* 345 U.S. 330, 338 (1953). In *Sumberland* v. *Long Island R.R. Co.*, 421 F. 2d 1219 (2 Cir., 1970) cert. den. ___ U.S. ___, it was held that the union did not breach its duty of fair representation when it made a settlement which favored a large number of its members over a few individuals. Thus, whether a bargaining representative has breached its duty of fair representation depends upon the facts of each case. *Balowski, supra.* On the facts of this case we cannot find the requisite fraud, collusion, bad faith, or hostile discrimination. There has been no refusal to process the grievances, or to arbitrate, there was no employer-union collusion, and there was no racial discrimination as in *Glover* v. *St. Louis,* 393 U.S. 324 (1969).

The union was in a difficult position in this case. It was charged with the duty of representing both the former Werner employees and the former Continental employees. The evidence shows that three of the four locals involved took a neutral position on the seniority question. The fourth local actively tried to secure a dovetailed seniority list, as does plaintiff. The position of neutrality did not prevent the locals from processing grievances to the OJSC, thereby setting the stage for a full and final decision on the merits. Neutrality in

this situation does not show bad faith anymore than it shows breach of duty of fair representation. *Bieski, supra.* It is probably the most prudent position for a union to take in this situation.

Plaintiff also claims that the various local business agents failed to find out enough information about the transaction to adequately represent plaintiff, and that the union should have submitted new evidence or theories of recovery. These claims do not show a breach of duty by the union. The fact that other theories should have been pressed is speculative at best. The actions or omissions of the business agents may have amounted to negligence but the Sixth Circuit Court of Appeals has recently held that proof that a union might have acted negligently or exercised poor judgment is not enough to support a charge of unfair representation. *Dill* v. *Greyhound,* 435 F. 2d 231 (6 Cir., 1970). Conclusory allegations are not enough to make out a showing of the requisite bad faith. *Balowski, supra.*

In summary, we hold that the bargained-for arbitration procedure was adequate to provide, and actually did provide, a fair decision; and that plaintiff did not sustain his burden of proof that the union breached its duty of fair representation. Therefore, plaintiffs claim for back pay must also fail, as must the claims of others in his class. This opinion shall constitute our findings of fact and conclusions of law as required by Rule 25, F.R. Civ. P.

It is so ordered.

DAVID S. PORTER
United States District Judge

Appendix III

No. 71-2044

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

ROBERT MORRIS, ET AL.,
Appellants,

v.

WERNER-CONTINENTAL, INC., ET AL.,
Appellees.

APPEAL from the United States District Court for the Southern District of Ohio.

Decided and Filed September 20, 1972.

Before PHILLIPS, TUTTLE,* and O'SULLIVAN, Circuit Judges.

TUTTLE, Circuit Judge. This appeal presents principally the question whether employees who are bound by arbitration provisions of a labor contract, having submitted a grievance to arbitration as provided in the contract, may appeal to the courts when it appears that the arbitration committee may have made an egregious error in the interpretation of terminology which controls the dispute.

The issue is further complicated because of the circumstance that the rights of the complaining employees are to be fixed, under their bargaining agreement, by terminology used between their employer and another corporation and under such circumstances, it is doubtful that the employees complaining in this action have the standing to prevent a practical rewriting of the contract which fixes their rights as to seniority by the

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* Elbert P. Tuttle, Senior Circuit Judge, United States Court of Appeals, Fifth Circuit, sitting by designation.

introduction of parol evidence completely changing the terminology used in the contract between the two corporations.

The following facts seem undisputed; in any event they are to be taken most strongly in favor of the appellants-employees of Continental Truck Lines because the trial court dismissed their complaint on the ground that the court would not interfere with a determination by the Ohio Joint State Grievance Committee of the International Brotherhood. In 1967, after considerable negotiation, a "plan and agreement of merger" was entered into between Werner Transportation Company and Continental Transportation Lines, Inc. This agreement was denominated throughout as a merger of the two companies, thus giving rise to the issue here. After the agreement was signed, but before it had gone into effect, the question was raised as to the seniority status of the Continental employees, principally drivers, under the newly organized Werner-Continental, Inc. Both parties agreed that the Ohio Joint State Grievance Committee had established rules governing seniority as follows:

> "The established Ohio practice is that employees of the *purchased* company are placed at the bottom of the seniority list of the purchasing company. The past practice shall continue to apply to all Ohio domiciled employees, except in the event of *merger* when the seniority of the employees affected shall be dovetailed by chronological listing unless otherwise mutually agreed to by the parties."

The trial court found "in 1967 the Werner Transportation Company and Continental Transportation Lines, Inc. entered into a *statutory merger agreement*, which was subsequently approved by the respective stockholders. The new company was known as Werner-Continental, Inc., but, in fact, the Werner Transportation Company was the survivor, operations removed from the Continental terminals to the Werner terminals, and the Werner managers were retained in their former po-

sitions, while the Continental managers were delegated to an assistant manager position. Mr. Werner retained full control of the newly merged company. The evidence shows that Werner was at all times a successful, prosperous company, while Continental was in financial difficulty."

While we do not recognize the relevance of the findings beginning with "but in fact the Werner Transportation Company was the survivor," they are not quite accurately stated. Werner-Continental, Inc. was the survivor and it was the survivor with additional common capital stock authorized, and had issued a very substantial amount of preferred stock, which was exchanged for the stock of Continental and which was convertible into common stock of Werner-Continental upon the election of its owners. Moreover, it appears that the former president of Continental was chairman of the board of the new corporation, although having very limited operational duties to perform. It is apparent that the reference made by the trial court to the success of the one corporation and the financial difficulties of the other bears upon some tests that are occasionally utilized to determine whether there has actually been a purchase of a defunct or failing corporation by a successful one. This is unimportant in this case, because there is no proof that Continental was in a failing or insolvent condition, although they had suffered losses during a period shortly before the "merger."

Both companies being engaged in land transportation, it was necessary for an application for permission to create the merger to be submitted to the Interstate Commerce Commission for its approval. The application to the Interstate Commerce Commission designated the proposal as a "merger," and the order issued by that Commission also carried that designation. It is not evident, however, from anything in the the record that it would have been of any significance in the treatment of the matter by the Interstate Commerce Commission had the application indicated that Werner wished to purchase Continental.

Mr. Werner, who at all times, both before and after the accession of Continental, was the managing head of Werner and of Werner-Continental, testified very frankly that the agreement to cast the association of the two entities in the form of a "merger" was a deliberate choice. He stated that he had tried to buy Continental as an outright purchase. He never made it clear, however, in his testimony, whether he wished for his company to purchase the assets subject to liabilities, or purchase the assets clear of liabilities, or to purchase the common stock from the stockholders of Continental. In other words, there is nothing in this record to indicate what it was Werner considered his company had purchased.

The merger agreement called for the surrender of all of the common stock of Continental in return for preferred stock of Werner-Continental, Inc. convertible into common stock on a specified ratio. This is what is known as a tax-free reorganization for income tax purposes, and Mr. Werner testified that he was unable to make a purchase because Mr. Harris, the president of Continental, refused to proceed on that basis on advice of his counsel. The second reason given was employee morale, that is to say, the morale of the Continental employees, the very people who are now complaining. It is clear that the effect of Mr. Werner's testimony is that he was told by Mr. Harris of Continental that they would have to "call the deal" a "merger" because the employees would be unhappy if, instead, Continental were in some way being sold out to Werner. The significance of this deception is that it was of great importance to the employees of Continental, in determining their course of action towards their employer, Continental, up to the time of the association of the two companies into one, to know whether they were to be dovetailed into the seniority system of the new corporation, which would be the case if it were a merger, as they were being told, or put at the bottom of the seniority list, as would be the case if it were a sale by Continental and a purchase by Werner, which they were objecting to.

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So we come up to the day of effective reorganization and for the first time the question is raised by Continental drivers who, naturally, wish to know what their seniority status is to be. They are first told by a letter from Mr. Werner that the transaction was a "merger" and they therefore would be dovetailed into the seniority list along with the Werner employees. Later, without any hearing of any sort, the committee received a correcting letter from Mr. Werner in which he stated that the transaction was a purchase and not a merger; thereupon, the committee set the matter down for hearing on a grievance or series of grievances that had been filed in the meantime by some of the drivers of Continental, the parties who are now sponsoring this action.

During the consideration of the contention of Mr. Morris and his fellow Continental drivers that the transaction between the two carriers had been a merger, the following facts became apparent. The Vice President of Werner originally wrote to the Ohio Joint State Committee (hereafter OJSC) stating that the transaction was a "merger", and that the seniority list would be dovetailed. He later wrote the Chairman of the OJSC stating that this determination of his had brought him a flood of complaints from his own drivers and that upon further consideration he was writing to advise the Committee that the transaction was a "purchase", and that the Continental drivers would be placed at the bottom of the seniority list. Thereafter, at a hearing of the Committee, Mr. Morris introduced into the record copies of the minutes of Werner authorizing a "merger" with Continental, an application by Werner, over the signature of its president, to the Interstate Commerce Commission asking permission to enter into a "merger", a notice to the stockholders of Werner, telling them of the plans for the "merger" with Continental, application to the Securities and Exchange Commission for a change in the name of Werner to Werner-Continental, in which the transaction is referred to as a "merger," and finally a statement to stockholders in which the same terminology is used. The

court can well get the feeling that what was done by the OJSC was simply to follow the dictates of Mr. Werner, even when he changed his mind, for, finally, following a May 15th session, the Chairman of the Committee announced the unanimous vote of the Committee as follows:

> "Following careful examination and consideration of all evidence submitted and after further investigation and consultation with legal counsel, it is the decision of the Ohio Joint State Committee that Werner Transportation Company did in fact purchase Continental Transportation Lines and the employees of Continental Transportation Lines are properly placed at the bottom of the consolidated seniority list of Werner-Continental, Inc. at the specified terminal points in accord with the established practice."

The plaintiffs do not contest the validity or effectiveness of the provisions in the National Master Freight Agreement establishing the grievance machinery, nor do they contest the applicability of the "practice" quoted above which provides that where two employers are joined by merger the employees are dovetailed for seniority purposes, whereas if they are joined by purchase the employees of the purchased company go at the bottom of the list. Their contentions here are, in effect, two-fold. The first contention is that the order of the ICC, which is an essential for the carrying on by the new Werner-Continental, Inc. of its transporation business, is res adjudicata of the fact that this was a "merger" and not a "purchase" by Werner of Continental. The second is that there were defects in the OJSC proceedings which make it null and void.

The trial court stated:

> "This court cannot and will not decide whether there was a merger or purchase in this case." Citing Steel Workers v. American Manufacturing Company, 363 US 564, together with Steel Workers v. Warrior and Gulf Com-

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pany, 363 US 574 and Steel Workers v. Enterprise Corp., 363 US 593, 1960.

Little need be said with respect to the contention of the appellants that the action of the Interstate Commerce Commission was res adjudicata as to the proper relationship between Werner and Continental at the time they became one. That is, whether this was a "merger" or "purchase." That was not an issue before the Interstate Commerce Commission. Appellant concedes that if the application filed with the ICC had stated it to be a "purchase" instead of a "merger", it would have made no difference. Thus, there was no contested issue as to which the order of the ICC undertook to offer a solution dealing with this problem.

With respect to the contention that certain procedural requirements were not met and that the Union breached its duty of fair representation of these particular appellants, we think it necessary to say that there were findings by the trial court rejecting these contentions. In the first place the court found that "the plaintiffs waived any objections they may have had to the alleged irregularities", citing *Order of Railway Conductors* v. *Clinchfield RR Company,* CA 6, 1969, 407 F.2d 985. In the *Clinchfield* case, this court held that the plaintiff had waived objections to the size of the Arbitration Board by acquiesence to the arbitration. With respect to the allegations that the Union representatives on the Joint Committee were either biased or had a conflict of interest or failed actively to present the contentions of the Continental drivers, the trial court said:

> "On the facts of this case we cannot find the requisite fraud, collusion, bad-faith, or hostile discrimination . . . .
>
> "The Union was in a difficult position in this case. It was charged with the duty of representing both the former Werner employees and the former Continental employees. The evidence shows that three of the four

locals involved took a neutral position on the seniority question. The fourth local actively tried to secure a dovetailed seniority list, as does plaintiff. The position of neutrality did not prevent the locals from processing grievances to the OJSC, thereby setting the stage for a full and final decision on the merits. Neutrality in this situation does not show bad faith any more than it shows breach of duty of fair representation (citing Bieski v. Eastern Automobile Forwarding Company, 3 Cir. 1968, 396 F.2d 32). It is probably the most prudent position for a Union to take in this situation . . . .

"In summary, we hold that the bargained for arbitration procedure was adequate to provide, and actually did provide, a fair decision; and that plaintiff did not sustain his burden of proof that the Union breached its duty of fair representation."

The recurrent theme which runs through appellants' brief and argument is that it simply can't be possible for the courts to permit the Continental drivers to be deprived of the rights to which they are entitled under the Ohio Past Practice by being dovetailed as to seniority with the drivers of Werner under the circumstances of this case. Although not saying so in so many terms, their argument runs to the proposition that it can be nothing more than an *ipse dixit* for the O.J.S.C., purely on the say-so of Mr. Werner or some lawyer's advice, to say that when all of the documents relating to the affiliation between the two companies were admittedly in terms of "merger" this was no merger at all, but was purchase of some undescribed property.[1] It is extremely difficult for us to see how the O.J.S.C. could translate or transform the merger

[1] We use this terminology because no where in the record is any effort made to explain what it is that even Mr. Werner thought the Werner Company had purchased. Certainly it didn't purchase the rolling stock or the terminals or the charter or the good will, or even the stock from the Continental stockholders. The latter was particularly avoided, because, as we read the testimony, it is plain that the transaction was cast in the form of a taxfree reorganization for income tax purposes.

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that actually took place into a purchase. However, perhaps unfortunately for the Continental drivers, but, also, fortunately for the promotion of industrial peace in general, it is not our place to decide this issue, nor was it the function of the trial court.

If any principle is generally recognized in labor relations these days, it is that the grievance procedures, leading ultimately to arbitration, if provided in a labor contract, as they most always are, are to be given the broadest possible construction. The law is well settled in this regard, since the three Supreme Court decisions, *Steel Workers* v. *American Manufacturing Co.*, 363 U.S. 564 (1960); *Steel Workers* v. *Warrior & Gulf Co.*, 363 U.S. 574 (1960); and *Steel Workers* v. *Enterprise Corporation*, 363 U.S. 593 (1960). As pointed out by the Supreme Court in those cases, the process of hearing and passing on grievances is part of the regular warp and woof of industrial labor-management relations. When the parties agree to contracts such as the National Master Freight Agreement, which has the explicit provision to the effect that questions of seniority shall be subject to grievance procedures, the courts will not only refrain from hearing appeals from the awards of such arbitration as may finally result in such grievance matters, but courts will, by injunction, require the parties to proceed with the arbitration proceedings in the event either of them should decline to do so.

This group of cases teaches us another thing as well — that is, that so long as there is an absence of fraud or bad faith or demonstrated bias or collusion, the decision by the arbitrators or, here, the Joint Committee, is final and binding and courts are generally powerless to interfere. It became the duty of the Joint Committee here to determine what the parties to the National Master Freight Agreement meant when they spoke of a "merger" and of a "purchase." While, as we have said, it would appear very difficult for any court to hold that on the record which we have disclosed above, there was anything other than a "merger" in the ordinary legal

sense, it turns out that the members of the committee, in solving a labor dispute, are not restricted to the legal terminology that would be binding on courts. Neither are they restricted to the written contracts between two parties, neither of whom is before the court. In sum, we conclude that having found the fact relating to the fairness of the proceedings as it did, the court properly declined to set aside the decision of the Ohio Joint State Committee. This decision by the court was fully justified by the language of the Supreme Court's opinion, "Words in a collective bargaining agreement, rightly viewed by the court to be the charter instrument of a system of industrial self-government, like words in a statute, are to be understood only by reference to the background which gave rise to their inclusion. The Court, therefore, avoids the prescription of inflexible rules for the enforcement of arbitration promises. Guidance is given by identifying the various considerations which a court should take into account when construing a particular clause – considerations of the milieu in which the clause is negotiated and of the national labor policy. It is particularly underscored that the arbitral process in collective bargaining presupposes that the parties wanted the informed judgment of an arbitrator, precisely for the reason that judges cannot provide it. Therefore, a court asked to enforce a promise to arbitrate should ordinarily refrain from involving itself in the interpretation of the substantive provisions of the contract."

The judgment is AFFIRMED.